IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0087
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
KEVIN LAGRON PENNINGTON,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20041829

Honorable Christopher C. Browning, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Julie A. Done
Phoenix
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Stephan J. McCaffery
Tucson
Attorneys for Appellant

B R A M M E R, Judge.

¶1 Appellant Kevin Pennington was charged with two counts of unlawful sale of a narcotic drug and convicted, after a jury trial, of one of those counts. The trial court found

Pennington had two historical prior felony convictions and sentenced him to a mitigated term of 11.5 years in prison. On appeal, he challenges the sufficiency of the evidence to support his conviction, contending the trial court erred when it denied his motion for judgment of acquittal made pursuant to Rule 20, Ariz. R. Crim. P., 17 A.R.S. We affirm.

¶2 We view the evidence in the light most favorable to upholding the verdict. *See State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). The events leading to Pennington's arrest and indictment are essentially undisputed. Tucson Police Officer David Jonason testified that on May 10, 2004, he had met Pennington in a motel parking lot during the course of an unrelated undercover assignment. Pennington had asked Jonason "what [he] needed," and had shown Jonason a glass pipe used for smoking crack cocaine, telling Jonason, "[T]hat's what I'm all about." Jonason had initially left the parking lot to continue his original investigation, but then located Pennington again and asked Pennington if he could "hook [Jonason] up with 40," meaning "$40 [worth] of crack cocaine." Pennington then got in Jonason's truck, borrowed his cellular telephone, contacted someone, and directed Jonason to drive to a public parking lot and park at its outskirts. A woman soon appeared, driving a small car, and parked a few spaces away from them. Jonason then gave Pennington $40, and Pennington left the truck, went over to the other vehicle and spoke with its driver, and returned with two, $20-sized rocks of crack cocaine. Pennington left the cocaine on the truck's console, and Jonason handed him a $5 bill. Pennington handed Jonason a piece of paper with a telephone number for "Baby G.," the

woman who had just supplied the drugs, suggesting that Jonason could contact her directly in the future. At Pennington's request, Jonason then left him at a motel.

¶3 Jonason testified that on the following day, he had found Pennington in the same parking lot where they had first met. Jonason told Pennington he had been unable to contact Baby G. through the telephone number Pennington had given him. Although Pennington was at first suspicious of Jonason, he eventually got into Jonason's truck and navigated as Jonason drove to a supermarket parking lot. Then Pennington again borrowed Jonason's cellular telephone, made contact with someone, and directed Jonason to drive to a darkened side street. Jonason again gave Pennington $40, and Pennington left the truck and walked to a poorly lit area. Shortly thereafter, Baby G. walked past the truck and over to Pennington; Pennington then returned to the truck, again with $40 worth of crack cocaine. He then asked Jonason to drive him back to the motel parking lot where Jonason had picked him up that night. Before Pennington got out of the vehicle, he asked Jonason for a piece of the crack cocaine. Jonason then broke off a portion of one of the crack cocaine rocks and handed it to Pennington, along with a $5 bill. Although the jury reached no verdict on count one of the indictment, related to the events of May 10, they found Pennington guilty of selling a narcotic drug on May 11, during his second encounter with Jonason.

¶4 Pennington maintains the trial court abused its discretion in denying his Rule 20 motion, arguing "no reasonable person could find that [he] was anything but a go-

between," and, therefore, the evidence was insufficient to support a conviction for selling cocaine. According to Pennington, "the legislature, by repealing the statutory language that removed the 'agency defense,' essentially reinstated it; thus, a drug-buyer's agent cannot be held liable for selling drugs."

¶5 "We review the denial of a Rule 20 motion for an abuse of discretion," *State v. Hollenback*, 212 Ariz. 12, ¶ 3, 126 P.3d 159, 161 (App. 2005), cognizant that "[a] directed verdict of acquittal is appropriate only where there is no 'substantial evidence' to support each element of the offense," *State v. Sabalos*, 178 Ariz. 420, 422, 874 P.2d 977, 979 (App. 1994), *quoting* Rule 20. "If reasonable minds could differ on the inferences to be drawn from the evidence," the motion must be denied. *State v. Sullivan*, 205 Ariz. 285, ¶ 6, 69 P.3d 1006, 1008 (App. 2003). Similarly, "[w]hen reviewing whether sufficient evidence supports a criminal conviction, we determine if '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Johnson*, 210 Ariz. 438, ¶ 5, 111 P.3d 1038, 1040 (App. 2005), *quoting Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979) (emphasis in *Jackson*).

¶6 Pennington is correct that the Arizona legislature has changed the statutory definition of "sale" that pertains to drug offenses. *Compare* former A.R.S. § 36-1001(10) (1956), *repealed by* 1979 Ariz. Sess. Laws, ch. 103, § 14 (defining "sale" as including "barter, exchange or gift, or offer therefor, and each such transaction made by any person, whether as principal, proprietor, agent, servant or employee"), *with* A.R.S. § 13-3401(32)

("'Sale' or 'sell' means an exchange for anything of value or advantage, present or prospective."). We do not agree, however, that the legislature intended to "reinstate" a common law defense of agency, particularly in light of the broad language of A.R.S. § 13-3408(A)(7), which provides:

> A person shall not knowingly:
>
> . . . .
>
> 7. Transport for sale, import into this state, offer to transport for sale or import into this state, sell, transfer or offer to sell or transfer a narcotic drug.

This language, like the language of former § 36-1001(10), suggests the legislature intended that § 13-3408(A)(7) encompass the conduct of one acting "'as agent, either for the seller or the purchaser, or as a go-between.'" *State v. Galvan*, 108 Ariz. 212, 214, 495 P.2d 442, 444 (1972), *quoting People v. Shannon*, 155 N.E.2d 578, 580 (Ill. 1959).

¶7 Moreover, although the state could have prosecuted Pennington on the theory of "transfer," as well as "sale," under § 13-3408(A)(7), *see State v. Braun*, 185 Ariz. 245, 247, 914 P.2d 1337, 1339 (App. 1995), we conclude reasonable jurors could have found the elements of sale on the evidence presented. Pennington reminded the jury numerous times during his testimony that he was an addict and testified that he had purchased crack cocaine with the $5 Jonason had given him on May 10. Although Pennington denied any personal motivation in the transaction, the jurors could reasonably have inferred that he had agreed to assist Jonason again on May 11 with the expectation that Jonason would, in turn,

give him either funds to purchase drugs or a portion of the crack cocaine that Pennington would deliver. *Cf. State v. Tubbs*, 173 Ariz. 127, 128, 840 P.2d 303, 304 (App. 1992) (court did not err in refusing to give jury instruction based on A.R.S. § 13-3412(A)(4)-(5), which exempts police agents from prosecution for engaging in illegal drug transactions; defendant's purpose "was not to assist a police investigation but rather to get cash or a pinch of the drug").

¶8 The evidence, and reasonable inferences drawn from it, were sufficient to establish that an exchange contemplated by § 13-3401(32) had occurred and to withstand Pennington's motion for a judgment of acquittal. *See State v. Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d 455, 458 (App. 2003) ("Substantial evidence, which may be either circumstantial or direct, is evidence that a reasonable jury can accept as sufficient to infer guilt beyond a reasonable doubt."). Because we conclude the trial court did not err in denying Pennington's Rule 20 motion, we affirm his conviction and sentence.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge